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IN THE

Supreme Court of the United States

PAUL J. FROMMERT, ET AL.,
Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,
Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that Release Petitioners' release of their ERISA claims was enforceable where (1) the Second Circuit recited an undisputedly correct rule of law that takes individual circumstances into account, and (2) applied that rule to an undisputed factual record regarding Release Petitioners' individual circumstances?

2. Whether the Second Circuit correctly applied "federal common law" in applying a well-established legal standard to the unique facts of this case?

3. Whether the Second Circuit correctly held that statutory requirements applicable by their terms only to releases of claims under the Older Workers Benefit Protection Act are inapplicable to ERISA claims?

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STATEMENT OF THE CASE

This lawsuit began in 1999, when a number of current and former participants in the Xerox Corporation Retirement Income Guarantee Plan ("Plan") sued the Plan, the Plan Administrators, and Xerox Corporation under the Employee Retirement Income Security Act of 1974 ("ERISA"). During the pendency of the lawsuit, the 18 Release Petitioners executed agreements releasing Respondents from "any and all claims" in exchange for a substantial salary continuance benefit. Two separate sets of Release Petitioners have petitioned this Court arguing that those releases are unenforceable. This Consolidated Brief in Opposition addresses both Petitions.

In the underlying lawsuit, Release Petitioners asserted that a Plan provision that reduced their benefits was not properly added to the Plan. In 2006, the Second Circuit agreed with Release Petitioners that the Plan provision in question was not properly disclosed to Plan participants until 1998. The Second Circuit later held that the 18 Release Petitioners' claims were barred by releases they signed between 2001 and 2006 in connection with their separation from Xerox. The latter holding was correct and, in any event, does not warrant review by this Court.

In the first of the two Petitions, the *Pietrowski* Petitioners argue that the Second Circuit adopted a "group standard" under which the individualized circumstances of employees releasing ERISA claims need not be considered. In fact, the Second Circuit did *not* adopt a "group standard"; rather, it applied

the very totality-of-the-circumstances test that Release Petitioners concede is applicable. That test, both as stated and as applied by the Second Circuit in the decision below, accords with the decisions of other Circuits and *does* take individual circumstances into account. Release Petitioners, moreover, never offered any individualized evidence in opposing Respondents' motion for summary judgment. Nor did they argue in the Second Circuit that a remand for additional factual development might have been required. For these reasons, the *Pietrowski* Petition should be denied.

In the second Petition, the *Frommert* Petitioners make a series of scattershot arguments that the Second Circuit failed to take into account various principles of federal common law in enforcing the releases. The common theme that unites these arguments is the assertion that the Second Circuit misapplied the correct rule of law to the particular facts of this case. Even if Release Petitioners were correct – and they are not – this Court should not review the Second Circuit's application of the correct rule of law to a particular set of facts.

The *Frommert* Petitioners also argue that the Second Circuit erroneously failed to apply certain technical provisions of a statute governing the release of age discrimination claims to their release of their ERISA claims. Decisions of this Court and every Circuit to address the question, however, make clear that the statute does not apply to non-age discrimination claims. Moreover, the releases in question fully complied with the statutory

requirements relied on by Release Petitioners. The *Frommert* Petition therefore should be denied.

1. Each of the Plaintiffs in the underlying lawsuit worked for Xerox for a period of time, left Xerox's employ, and later was rehired by Xerox. (*Frommert* Pet. App. 23a.) When Plaintiffs' initial period of employment with Xerox ended, they received lump sum distributions of benefits from the Plan. (*Id.*) They each resumed earning benefits upon being rehired. (*Id.*) To avoid giving such rehired employees double credit for their initial period of service, the Plan provides that the pension benefits of rehired employees must be reduced, or "offset," by the value of their prior benefit distributions.

This lawsuit arises from a challenge to one of the two Plan provisions governing the calculation of this offset – a provision that the Second Circuit referred to as the "phantom account" offset provision. In 2004, the District Court issued a summary judgment rejecting Plaintiffs' challenge to that provision. In 2006, the Second Circuit reversed the District Court in part, holding that the "phantom account" offset provision was not fully disclosed to Plan participants until 1998. (*Id.* at 6a.) The Second Circuit did not find that the provision was unlawful or substantively unfair; it held only that the provision was not fully disclosed in the manner required by ERISA prior to 1998. It remanded the case to the District Court with instructions to recalculate Plaintiffs' benefits under the Plan without reference to the "phantom account" offset provision. (*Id.*)

On remand, the District Court in 2007 held that the Plan – excised of the provision in question – permits the Plan to offset a rehired employee's benefit only by the *nominal* amount of the employee's prior distribution, without accounting for the time value of money. (*See id.* at 30.) Plaintiffs' own expert recognized that this result conferred a windfall on rehired employees. (A. 484.)[1] The Second Circuit nevertheless affirmed this holding of the District Court in the decision below. (*Frommert* Pet. App. 9a).[2]

2. Over the past decade, Xerox has periodically instituted various voluntary and involuntary "reduction in force" programs. Under these programs, participating employees receive up to 52 weeks of salary continuance upon the signing of a general release ("Release"). (*See id.* at 32a.) The *Frommert* and *Pietrowski* Petitions arise from the fact that 18 individual Plaintiffs signed Releases during the pendency of this action. (*Id.* at 13a-14a n.3.)

The Releases expressly provided that the employees released "Xerox from *any and all claims . . . based on anything that has occurred prior to the date [they] sign[ed] th[e] release.*" (*Id.* at 14a (emphasis added).) The term "Xerox" in the Release

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[1] References to "(A. __)" are to Appellants' Appendix, submitted below.

[2] That holding is the subject of a separate petition for a writ of certiorari filed by the Plan and its Plan Administrators. (*See* Dkt. No. 08-810.)

is defined to include, among other entities, the "Xerox employee benefit plans" and their administrators. (*Id.* at 33a-34a n.2.)

The Release counseled employees to take sufficient time in deciding whether to sign the Release, gave them 45 days to consider the Release before returning it to Xerox, and gave them another seven days to revoke the Release after signing it. (*Id.* at 82a.) The Release also expressly advised employees to consult with an attorney before signing the Release. (*Id.* at 81a.)

3. In January 2001, counsel for Plaintiffs in this lawsuit filed an "emergency" motion asking the District Court to enjoin Xerox from seeking a release of Plaintiffs' claims. In support of that motion, Plaintiffs' counsel submitted an affidavit stating that he had consulted, among others, with each of the Release Petitioners who was then a party to this action regarding the Release. (*See* A. 49.)

As Plaintiffs' counsel acknowledged in his affidavit, the Releases "explicitly include[d] a release of all claims under ERISA" and, in particular, encompassed Plaintiffs' claims "for recalculation of retirement benefits under ERISA." (*Id.* at 47-48.) For that reason, Plaintiffs' counsel suggested that his clients seek permission from Xerox to "sign a general release which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." (*Id.* at 49-50.) Specifically, Plaintiffs' counsel suggested adding the following language to the Release: "This release does not intend to and does not release any claim the undersigned has

asserted or will assert for recalculation of retirement benefits" under the Plan. (*Id.* at 67.) According to the affidavit, however, Plaintiffs who brought this revised language to the attention of Xerox were informed that they would not be eligible for salary continuance "unless they execute[d] the general release in the form provided by Xerox." (*Id.* at 50.)

The District Court denied Plaintiffs' "emergency" motion regarding the release issue in January 2001. (*Frommert* Pet. App. 33a.)

4. By 2006, a total of 22 *Frommert* Plaintiffs had signed Releases that were accepted by Xerox. (A. 1047-48.) Four of those individuals had altered the forms provided to them to carve out the *Frommert* lawsuit from the scope of the released claims.[3] Although Xerox's acceptance of the four modified releases was inadvertent, Respondents conceded below that the claims of these four individuals are not barred. (*Frommert* Pet. App. 13a-14a n.3.) Thus, the instant dispute concerns only the Releases signed by the remaining 18 Release Petitioners.

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[3] Those four individuals did so by inserting the italicized language below:

> I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, *including any right to a pension under the Xerox Retirement Pension Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit.*

(*Frommert* Pet. App. 34a.)

In November 2006, Respondents filed a motion for summary judgment seeking to enforce the Releases. (*See* A. 1051.) In support of that motion, Respondents submitted, pursuant to Local Rule 56.1, a Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried ("Rule 56 Statement"). Respondents' Rule 56 Statement, among other things, averred that each of the Plaintiffs was "educated and worked in salaried positions at Xerox for many years" and that each was "represented by counsel" in this lawsuit at "the time the[y] signed the releases." (*Id.* at 1048-49.)

In responding to that motion, Release Petitioners did not submit any additional facts or in any way controvert the facts set forth in Respondents' Rule 56 Statement and supporting affidavits. Indeed, Release Petitioners acknowledged in their brief that "the plan participants who signed general releases had available to them counsel who had been a part of this case since November 1999." (A. 1103.) Release Petitioners argued only that the Releases by their terms were unenforceable in this case.

5. In its 2007 decision, the District Court denied Respondents' motion for summary judgment on the release issue. The District Court recognized that plan participants may knowingly and voluntarily waive ERISA claims. (*Frommert* Pet. App. 34a-35a (citing, *inter alia*, *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)).) It further recognized that, in order to determine whether a waiver is knowing and voluntary, courts must consider the

"totality of the circumstances," including but not limited to

> (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. [hereinafter, the "*Laniok* factors"]

(*Frommert* Pet. App. 35a-36a.)

The District Court, moreover, acknowledged that a number of the *Laniok* factors, "such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases." (*Id.* at 36a.) However, it held that other factors, "particularly the clarity of the release and the consideration given by Xerox in exchange for the releases," rendered the Releases unenforceable. (*Id.*)

The District Court's holding that the Releases were insufficiently clear was based primarily on

Release language stating that "the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." (*Id.* at 34a.) According to the District Court, this language arguably carved out Release Petitioners' claims from the scope of the Release because the Second Circuit had determined in its 2006 decision that Release Petitioners were "entitled by law" to benefits calculated without reference to the so-called "phantom account" offset provision. (*Id.* at 37a-38a.)

The District Court also held that the "consideration given by Xerox in exchange for the releases" militated against their enforcement. (*Id.* at 36a.) Specifically, the District Court observed that, under the Older Workers Benefit Protection Act ("OWBPA"), an "individual may not waive any right or claim under [the Age Discrimination in Employment Act ("ADEA")] unless the waiver is knowing and voluntary," which for OWBPA purposes requires, among other things, that the "the individual waive[] rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." (*Id.* at 37a (quoting 29 U.S.C. § 626(f)).) According to the District Court, the Releases were unenforceable in part because "the consideration received by [Release Petitioners], *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Id.* at 41a.)

6. In its 2008 decision, the Second Circuit reversed the District Court on the release issue. It began by citing the two leading Second Circuit cases

regarding the waiver of ERISA claims – *Finz* v. *Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), and *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991) – for the proposition that "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.'" (*Id.* at 15a.) (citations omitted).) It then recited the same non-exhaustive list of *Laniok* factors cited by the District Court. (*Id.* at 16a.) Unlike the District Court, the Second Circuit concluded, after "reviewing the undisputed facts pertaining to these releases under the totality of the circumstances," that Release Petitioners knowingly and voluntarily gave the Releases. (*Id.* at 19a.)

As part of its totality-of-the-circumstances analysis, the Second Circuit concluded that "the explicit and broad language in the release form" – which released Respondents from "any and all claims" arising prior to the giving of the Release – unambiguously covered Release Petitioners' claims. (*Id.* at 14a, 16a.) In so holding, the Second Circuit rejected the District Court's argument that the "entitled by law" language narrowed the scope of the Release. As the Second Circuit explained, that argument "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Id.* at 17a-18a.)

The Second Circuit also rejected the argument that the Releases were unenforceable because the consideration provided in exchange for them was less than what Release Petitioners otherwise would have

received under the District Court's subsequent benefits calculation. As the Second Circuit explained, "neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs[] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Id.* at 19a.)

Finally, the Second Circuit considered the District Court's conclusions that "the releases failed to comply with a provision of the [OWBPA] and that such noncompliance has relevance to the determination of whether [Release Petitioners] released Xerox from ERISA-based claims." (*Id.* at 18a n.4.) The Second Circuit declined to examine whether in fact the Releases violated the OWBPA, instead holding that "such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was 'knowing and voluntary.'" (*Id.*)

REASONS FOR DENYING THE PETITIONS

I. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "GROUP STANDARD" QUESTION.

The *Pietrowski* Petitioners (Dkt. No. 08-826) urge this Court to grant the writ because the Second Circuit purportedly adopted a new "group standard" for evaluating the validity of releases under ERISA that "moots inquiry into the particular circumstances attending each individual releasor's execution of the release." (*Pietrowski* Pet. at 15a-16a.) In fact, the Second Circuit did no such thing. Rather, it recited

and applied the very same totality-of-the-circumstances test that the Second Circuit and other courts of appeals have long employed in evaluating the release of ERISA claims. This case accordingly does *not* present a conflict among the Circuits regarding any question of law. Rather, at best, Release Petitioners disagree with the Second Circuit's application of a well-established rule of law to the particular facts of this case. Certiorari is therefore unwarranted.

Release Petitioners, moreover, neither came forward with any individualized facts in opposing Respondents' motion for summary judgment in the District Court nor argued to the Second Circuit that a remand for additional factual development might be required. Accordingly, Release Petitioners waived the argument that a remand was required, and the decision of the Second Circuit, in light of the undisputed factual record before it, was plainly correct. The Petition should be denied for these reasons as well.

A. The Second Circuit Did Not Adopt A New "Group Standard" For Reviewing Releases Of ERISA Claims.

In *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992), the Second Circuit held that "waiver of pension benefits is subject to closer scrutiny than . . . waiver of general contract claims" and therefore "required close inspection of the totality of circumstances surrounding a waiver of ERISA benefits" in order to ensure that the waiver is knowing and voluntary. *Id.*

at 81 (citing *Laniok* v. *Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)). The Second Circuit also observed that the *Laniok* factors, while "not exhaustive," "may be examined" as part of the totality-of-the-circumstances analysis. *Finz*, 957 F.2d at 81.

As the *Frommert* Petitioners acknowledge, "the Second Circuit applied the factors set forth in *Laniok*" in the decision below. (*Frommert* Pet. at 17.) Indeed, contrary to the *Pietrowski* Petitioners' suggestion, the Second Circuit expressly considered not only the language of the Releases, but also the other relevant *Laniok* factors – including, for example, the consideration given to Release Petitioners and the amount of time that Release Petitioners were given to decide whether to sign the Releases. (*Pietrowski* Pet. App. 22a.) Only then did the Second Circuit conclude, after "*reviewing the undisputed facts pertaining to the[] releases under the totality of the circumstances*," that the Releases are enforceable. (*Id.* at 21a (citing *Finz*, 957 F.2d at 82) (emphasis added).)

Unable to find any support for the proposition that the Second Circuit rejected the well-established totality-of-the-circumstances test in favor of a new "group standard," Release Petitioners instead seek to divine the "group standard" from an *amicus* brief offered in support of Respondents. That amicus brief, according to Release Petitioners, urged the Court to adopt a rule under which "form releases affecting large numbers of laid off workers . . . should trump individualized process." (*Pietrowski* Pet. at 16a-17a.) Notably, however, Release Petitioners do not – and

cannot – cite any language in the Second Circuit's decision adopting such a test.

To the contrary, the Second Circuit expressly recited a rule of law that takes into account, as part of the totality of the circumstances, both the language of the release *and* the individual circumstances of the employees who signed the release. (*Pietrowski* Pet. App. 17a-18a.) Release Petitioners themselves concede that this is both the correct rule of law and the rule of law applied by other courts of appeals. (*Pietrowski* Pet. at 12-13.) Their quibble with the way that the Second Circuit *applied* this rule of law to the particular circumstances of this case does not warrant this Court's review.

B. Release Petitioners Waived The Argument That Additional Evidence Is Required In Order To Determine The Validity Of Their Releases.

The *Pietrowski* Petitioners argue that the Second Circuit should have remanded for further development of the factual record regarding their individual circumstances. But Release Petitioners failed to make this argument below. Accordingly, even if their Petition presented an important or controversial question of law (and it does not), this case would be a poor vehicle for resolving any such question.

In the decision below, the Second Circuit reversed the District Court and held that Respondents were entitled to summary judgment on the release issue.

Release Petitioners now for the first time argue that summary judgment was inappropriate because additional fact-finding was required. According to Release Petitioners, the Second Circuit should have "remand[ed] the case to the district court" rather than reverse the District Court on the release issue. (*Pietrowski* Pet. at 8.)

Release Petitioners, however, at no point argued – either in the District Court or the Second Circuit – that additional fact-finding would be necessary were either court to reject their legal arguments regarding the Release language. Having failed to argue below that a remand for additional fact-finding was required, Release Petitioners have failed to preserve this issue for decision by this Court. *See Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that "was inadequately preserved in the prior proceedings"). Certiorari is therefore unwarranted.

C. The Second Circuit Reached The Correct Result In Light Of The Factual Record Before It.

Contrary to *Pietrowski* Petitioners' assertions, the record before the Second Circuit included facts regarding the individual circumstances of each Release Petitioner. These facts, moreover, were undisputed, as Release Petitioners failed to offer any evidence in response to Respondents' factual showings. In light of the undisputed factual record provided by Respondents, the decision of the Second Circuit was correct.

After this case was remanded to the District Court in 2006, Respondents moved for partial summary judgment, asserting that Release Petitioners' claims were barred by the Releases. (A. 1051 *et seq.*) In support of that motion, Respondents came forward with evidence regarding each of the *Laniok* factors (other than the clarity of the release, which is a pure question of law). Specifically, Respondents adduced evidence showing that Release Petitioners (1) were "educated and worked in salaried positions at Xerox for many years," (2) had ample time (45 days) to consider whether to sign the Releases, (3) received significant consideration in exchange for the Releases, (4) were encouraged by Xerox to consult an attorney before signing the Releases, and (5) were represented by counsel at the time they signed the Releases. (A. 1047-49.)[4] Respondents also demonstrated that Plaintiffs' counsel had advised his clients that the Releases in fact would bar their claims in the ongoing *Frommert* litigation. (*Id.*)

Respondents presented a *prima facie* case that the Releases were knowingly and voluntarily given, thereby satisfying their burden on summary judgment.[5] Release Petitioners were therefore

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[4] Respondents conceded that Release Petitioners had no role in deciding the terms of the release.

[5] *See, e.g.*, *Houghton* v. *South*, 965 F.2d 1532, 1536 (9th Cir. 1992) ("Where, as here, the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." (quoting *International Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991))).

obliged to come forward with whatever evidence they had to defeat Respondents' summary judgment motion. *See* Fed. R. Civ. P. 56(e)(2) ("When a motion for summary judgment is properly made and supported, an opposing party . . . must . . . set out specific facts showing a genuine issue for trial.").[6] But Release Petitioners failed to come forward with *any* evidence regarding their individual circumstances in opposing summary judgment. Nor did they dispute any of the facts adduced by Respondents. Thus, each of the facts adduced by Respondents must be accepted as true, and Release Petitioners are not entitled to ask for consideration of additional facts that were not presented in response to the summary judgment motion. *See* Fed. R. Civ. P. 56(c).

Release Petitioners' assertion that the Second Circuit failed to consider their individual circumstances is therefore incorrect. The Second Circuit decided the release issue based upon the "undisputed facts" provided by Respondents concerning the circumstances of each Release Petitioner. For instance, while Release Petitioners assert that the Second Circuit failed to take into account "the specific education and business experience of individual releasors" (*Pietrowski* Pet. at 20), the "undisputed facts" in the record on summary

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[6] *See also, e.g., Irby* v. *Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) ("Once a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.").

judgment included the facts that "*[e]ach* of the[] [Release Petitioners] are educated and worked in salaried positions at Xerox for many years" (A. 1048 (emphasis added)).[7]

Virtually every *Laniok* factor weighed in favor of enforcing the Releases, and Release Petitioners failed to present any evidence suggesting that the Releases were unknowing or involuntary. Accordingly, based on the undisputed factual record before it, the decision of the Second Circuit was correct. Further review is unwarranted.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "FEDERAL COMMON LAW" QUESTION.

The *Frommert* Petitioners (Dkt. No. 08-803) assert – on the facts of this case and in light of the precise language used in the Releases – that the Second Circuit erred in enforcing the Releases signed by Release Petitioners. Notably, they do *not* argue that the Second Circuit employed an incorrect legal standard – let alone a legal standard that is in

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[7] Release Petitioners note that four Plaintiffs carved out the *Frommert* lawsuit from their Releases and that those Releases were accepted by Xerox without any reduction in consideration. (*Pietrowski* Pet. at 19.) According to Release Petitioners, some of their number might have learned of these facts and, if so, "may have concluded" that "*Xerox itself* interpreted the general release to *not* encompass" the *Frommert* litigation." (*Id.* at 20.) This argument is wholly speculative and unsupported by record evidence. It also ignores the undisputed fact that Xerox's acceptance of the adulterated Releases was inadvertent. (*See* Appellants' Brief at 21 n.5.)

conflict with a decision of any other Circuit. To the contrary, Release Petitioners point to the Second Circuit's prior *Finz* and *Laniok* decisions as correctly stating the legal standards governing the enforceability of releases of ERISA claims. (*Frommert* Pet. at 9-10 & n.3, 12.) Accordingly, further review is not warranted.

1. Release Petitioners are unable to point to any rule of law misstated by the Second Circuit. Indeed, Release Petitioners concede that the totality-of-the-circumstances test recited by the Second Circuit is both correct and entirely consonant with decisions of the other Circuits. (*See id.*) Release Petitioners' argument instead boils down to an assertion that the Second Circuit did not properly interpret the language used in the Releases and therefore misapplied the governing legal standard to the facts of this case.

The Releases in question state that Release Petitioners release Respondents from "any and all claims . . . based upon anything" that occurred prior to the signing of the Releases. (*Frommert* Pet. App. 14a.) Release Petitioners, however, argue that the Releases do not bar their claims because of the following Release language: "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." (*Frommert* Pet. at 6.) According to Release Petitioners, because they are "entitled by law" to a calculation of benefits that is not premised upon application of the so-called "phantom account" offset provision, the Releases do not bar their claims in this case. (*See id.* at 14.)

As the Second Circuit explained, this argument "conflate[s] the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Frommert* Pet. App. 17a-18a.) Moreover, Release Petitioners' argument that the Second Circuit misapplied the above-quoted Release language to the unique facts of this case does not present an important and recurring issue of federal law requiring this Court's review. The Petition should therefore be denied. *See* Sup. Ct. R. 10.

2. In an attempt to escape this conclusion, Release Petitioners assert that the decision below violated "federal common law" and various "principle[s] of contract interpretation." (*Frommert* Pet. at 12.) Notably, however, each of the principles cited by Release Petitioners is entirely consistent with the totality-of-the-circumstances test applied by the Second Circuit.

Release Petitioners first argue that "the validity of an individual's waiver of pension claims should be subjected to closer scrutiny than waiver of general contract claims." (*Frommert* Pet. at 12 (citing *Finz*, 957 F.2d at 81).) The decision of the Second Circuit is not in conflict with this principle. To the contrary, the Second Circuit held that the Releases were given knowingly and voluntarily only after citing the *Finz* decision for an "articulat[ion]" of the "relevant" law. (*Frommert* Pet. App. 19a (citing *Finz*, 957 F.2d at 82).)

Release Petitioners further argue that a release "drafted by the employer . . . must be construed in

favor of the employee." (*Frommert* Pet. at 13.) The identity of the drafter, however, is among the *Laniok* factors that the Second Circuit indisputably applied in this case. *See* 935 F.2d at 1368 (listing "the role of plaintiff in deciding the terms of the agreement" as among the relevant factors in determining whether a release is knowing and voluntary). This rule of construction, moreover, is irrelevant where the language in question is unambiguous, as the Second Circuit held the Releases were here.[8]

According to Release Petitioners, another relevant "principle of contract interpretation . . . is that courts must ensure that federally protected rights are 'not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives.'" (*Frommert* Pet. at 12 (citation omitted).) But Release Petitioners are unable to point to any conflict between this alleged

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[8] Release Petitioners also suggest that the Releases were ambiguous because they did not specifically reference the *Frommert* lawsuit (*Frommert* Pet. at 11), but there is no requirement that a specific action – or cause of action – must be expressly referenced in order to be covered by a release, *see generally Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) (rejecting argument that "for a release to cover an ERISA claim, it must specifically mention ERISA"). The Releases here released "Xerox from any and all claims . . . based upon anything that has occurred prior to the date [he or she] sign[s] the release." (*Frommert* Pet. App. 14a.) This language plainly covered the *Frommert* lawsuit, as evidenced by the fact that Plaintiffs' counsel advised his clients that the Releases covered their claims for recalculation of pension benefits. (*See* A.47-50.)

rule of construction and the Second Circuit's conclusion, in light of the "undisputed facts" and the "totality of the circumstances," that the Releases should be given effect. (*Frommert* Pet. App. 19a.) Release Petitioners also overlook the fact that they were represented by counsel when they signed the Releases, thereby negating any inference that they lacked "information regarding their legal alternatives." (A. 1049.)

Finally, Release Petitioners assert that the decision below improperly "places the burden" of proof "on plan participants to establish that the release form was not a knowing and voluntary waiver." (*Frommert* Pet. at 9.) Release Petitioners, however, fail to cite any portion of the Second Circuit opinion that does so.

In sum, the decision of the Second Circuit is entirely consistent with the various interpretive principles cited by Release Petitioners. While Release Petitioners assert that the Second Circuit incorrectly applied those principles as part of its totality-of-the-circumstances analysis, nothing in the decision below supports that assertion. Ultimately, Release Petitioners do no more than disagree with the Second Circuit's interpretation of the specific release language at issue and its application of an uncontested legal standard to the particular facts of this case. Their Petition should thus be denied. *See* Sup. Ct. R. 10.

III. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "OWBPA" QUESTION.

The *Frommert* Petitioners also argue that failure to comply with the technical requirements of the OWBPA should render the release of ERISA claims invalid in cases where the release also purports to apply to ADEA claims. (*Frommert* Pet. at 15.) This Court rejected that argument in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). Moreover, the Releases at issue here fully complied with the OWBPA. Further review of the Second Circuit's OWBPA holding is thus unwarranted.

A. The OWBPA Requirements For Releases Do Not Apply To ERISA Claims.

In 1990, Congress amended the ADEA by passing the OWBPA. The OWBPA provides that "[a]n individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It then sets forth certain technical requirements that employers must meet in order for a release to be deemed "knowing and voluntary" under the ADEA. *See id.* The requirements include, for example, notification of "the job titles and ages of all individuals eligible or selected for" an exit incentive program. *Id.* at § 626(f)(1)(H)(*ii*).

In *Oubre*, this "Court repeatedly stated that the OWBPA applies *only* to ADEA claims, *and no others*." *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002) (emphasis added). For

instance, the Court expressly contemplated circumstances "where a release is effective as to some claims but not as to ADEA claims." *Oubre*, 522 at 428; *accord Chaplin*, 307 F.3d at 375 ("The Court expressly conceived a case in which a release might bar all claims but an ADEA claim because the release did not comply with the OWBPA.").[9]

Release Petitioners assert that age discrimination claims under the ADEA "should not logically receive a higher degree of protection than an employee's contractual right to a pension." (*Frommert* Pet. at 15.) As this Court made clear, however, the technical requirements set out in the ADEA reflect Congress' judgment that age discrimination claims do deserve greater (or at least different) protections than other claims. *See Oubre*, 522 U.S. at 427 ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word."); *see also id.* (stating that the regime implemented by the OWBPA is entirely "separate and apart from contract law"). Accordingly, Release Petitioners' appeal to "logic" is at odds with

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[9] *See also Oubre*, 522 U.S. at 426-27 ("The statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."); *id.* at 427 ("An employee 'may not waive' an ADEA claim unless the employer complies with the statute."); *id.* ("The OWBPA governs the effect under federal law of waivers or releases on ADEA claims."); *id.* at 428 ("As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims."); *id.* ("It suffices to hold that the release cannot bar the ADEA claim."); *id.* ("The statute governs the effect of the release on ADEA claims.").

the legislative judgment reached by Congress in the OWBPA.[10]

Given this Court's holding in *Oubre*, Release Petitioners unsurprisingly cannot point to any conflict in the courts of appeals regarding the applicability of the OWBPA to the release of ERISA claims. No such conflict exists; the Circuits that have considered the issue agree with the Second Circuit that the OWBPA is irrelevant to the question whether a release of non-ADEA claims is knowing and voluntary. *See, e.g.*, *Chaplin*, 307 F.3d at 375-76 ("The language of *Oubre* precludes plaintiffs' argument that the OWBPA applies to a release of an ERISA claim."); *Blackwell* v. *Cole Taylor Bank*, 152 F.3d 666, 673 (7th Cir. 1998) ("There is no counterpart in Title VII land to the [OWBPA], and so [plaintiff]'s waiver of her claim of race discrimination was valid as long as it met the usual criteria for an effective waiver, that is, as long as it was knowing and voluntary.").

In sum, Release Petitioners' argument is inconsistent with a decision of this Court and has been rejected by every Circuit to consider the issue. The writ therefore should be denied.

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[10] Logic, moreover, in no way dictates that various technical requirements under the OWBPA – such as the requirement that employees receive notice of the ages of the individuals eligible to participate in early retirement programs – should have any relevance in determining whether the waiver of an ERISA claim is knowing and voluntary.

B. The Releases At Issue Here Do Not Violate The OWBPA.

Release Petitioners assert that the Releases at issue here violate the OWBPA requirement that an employee waive "rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). This is because, according to Release Petitioners and the District Court, "the consideration received by [Release Petitioners], *i.e.*, the salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Frommert* Pet. App. 41a.) This contention misses the mark.

The interpretation of the OWBPA advocated by Release Petitioners would require courts – in evaluating whether a release complies with the OWBPA – to determine on a case-by-case basis whether the consideration provided for the release exceeds the value of the released claims.[11] The OWBPA does not require this extraordinary result.

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[11] For example, consider an employee who provides a release of an age discrimination claim in exchange for $10,000. Under Release Petitioners' theory, the release would be invalid if the employee was "already . . . entitled" by law to an amount exceeding $10,000. The employee's entitlement, moreover, would be measured on Release Petitioners' theory not only by reference to mature and acknowledged obligations but also to contested and indeterminate obligations, including those arising out of the employee's age discrimination claim itself. In other words, if it turned out that the employee was "legal entitled" to back pay in an amount exceeding $10,000, the release would be ineffective.

Rather, the purpose of the OWBPA requirement is to ensure that a release is not given gratuitously. In other words, the OWBPA merely (1) requires that a release be supported by consideration, and (2) underscores that the consideration cannot be illusory but instead must be "in addition to anything of value" to which the employee already has an acknowledged entitlement.

As the Second Circuit cogently observed, "neither the uncertainty of [Release Petitioners' pension] benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the[y] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Frommert* Pet. App. 19a.) When Release Petitioners' signed the Releases, they received substantial consideration – in the form of a salary continuance – in exchange for a release of "any and all claims," including their contested claims for additional retirement benefits in this action. At that time, they had no legal entitlement to pension benefits recalculated in the manner eventually ordered by the District Court; rather, the proper method of calculating their pension benefits was (and remains) disputed. As such, the consideration they received in exchange for the Releases plainly exceeded anything to which they already were "entitled by law" at the time they signed the Releases.

In sum, because the Releases signed by Release Petitioners clearly comply with the in-any-event irrelevant provision of the OWBPA on which Release Petitioners rely, further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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